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No. 90-199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TELEDYNE, INC.,

Petitioner,

—v.—

MARJORIE DATSKOW, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Teledyne, Inc. hereby replies to the brief of respondents in opposition to the petition for a writ of certiorari.

ARGUMENT

I

On the issue of standard of review, both sides agree there is no dispute about what happened: respondents attempted extraterritorial service by mail upon the named defendant, Teledyne, Inc.; Teledyne, Inc.[1] timely raised the defense

1 On pages 4 and 18 of their brief, respondents suggest that a generic all-encompassing "Teledyne" answered the complaint, and that counsel who appeared at the scheduling conference was appearing on behalf

of invalid service in its answer to the complaint; and three weeks later, at a scheduling conference, counsel for Teledyne, Inc. was silent about its defense of invalid service and did not raise it again until its motion to dismiss, timely filed in accordance with the magistrate's scheduling order.

Respondents argue that since the District Court's determination on waiver was based upon undisputed facts, this ruling became a "legal" conclusion which the Second Circuit could "correct" without deference to the District Court. Waiver of a defense timely interposed, however, is precisely the kind of fact-specific question the Court has stated, time and time again, must be reviewed by appeals courts under a deferential standard, even when the facts relating to the pretrial conduct are not in dispute or are contained in documents. *Cooter & Gell v. Hartmarx Corp*, 110 S. Ct. 2447 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Amadeo v. Zant*, 486 U.S. 214 (1988); *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Contrary to respondents' argument, the Court's line of decisions culminating last term in *Cooter & Gell* does not depend on evidentiary hearings nor the express application of Rule 52 of the Federal Rules of Civil Procedure.[2] *Pierce v. Underwood*, 487 U.S. 552 (1988), which respondents have not addressed, as well as *Cooter & Gell*, involved neither evidentiary hearings nor Rule 52 findings of fact. The Court in each case held that a deferential standard of review is to be applied to a district court's determination regarding pretrial conduct. As noted by the Court in *Pierce*, questions involving

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of Teledyne Industries, Inc. This is incorrect. As the District Court found, it was Teledyne, Inc. which was named in the complaint, timely answered and raised the defense of invalid service, and, by its counsel, appeared at the scheduling conference. (20a & n.3).

2 Respondents' suggestion notwithstanding, petitioner nowhere argued that Rule 52 expressly applies to a Rule 12 determination. Petitioner argued only that, under the Court's decisions the principles of Rule 52 are equally applicable to the review of all "fact-specific" district court determinations.

" 'supervision of litigation,' " as here, have long been given "abuse-of-discretion review." 487 U.S. at 558 n.1 (citing cases and other examples of pretrial determinations).

In the case at bar, the Second Circuit did not review under an abuse-of-discretion/deferential standard the following pretrial findings which related to the issue of waiver:

1. While the District Court found that respondents were not misled by Teledyne, Inc.'s use of the name "Teledyne" in a number of its subsidiary companies (App. 20a n.3),[3] the Court of Appeals found respondents were misled (App. 9a-10a);

2. Although the District Court found Teledyne, Inc. and Teledyne Industries, Inc. are separate legal entities (App. 22a & n.4), the Court of Appeals treated them as interchangeable, and in fact held that Teledyne, Inc., by the action of its counsel, waived the defense even as to Teledyne Industries, Inc., an entity which was not named and did not appear as a party (App. 12a);

3. While the District Court found that respondents sued and intended to sue Teledyne, Inc. (App. 20a & n.3, 33a), the Court of Appeals found that respondents sued and intended to sue Teledyne Industries, Inc. (App. 9a);

4. Whereas the District Court found in effect that respondents were not prejudiced by conduct of petitioner but by their own mistakes and their decision to commence the action "with only four days remaining on the limitations 'clock' " (App. 30a), the Court of Appeals implicitly found that respondents were prejudiced (App. 12a).

Based upon these findings and others which were not in dispute, the District Court rejected as "wholly without merit" the notion that petitioner somehow "waived" its

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3 The "App." references used in this reply brief refer to the appendix to the petition for a writ of certiorari.

jurisdictional defenses. (App. 18a n.1). The Second Circuit, upon a cold record, found to the contrary. This was not a correction of a "legal error," as respondents argue, and the Second Circuit did not point to any "legal error." *See* App. 12a.

Respondents misunderstand that the conclusion whether a pleaded defense has been waived is not a question of law, but a mixed question of law and fact. Rule 12, as the Court explained in *Cooter & Gell* with reference to Rule 11, "requires a court to consider issues rooted in factual determinations." 110 S. Ct. at 2459. "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshall the pertinent facts and apply [a] fact-dependent legal standard. . . ." *Id.* at 2459. Where, as here, "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 2458 (quoting *Anderson v. Bessemer City*, 470 U.S. at 573-574).

The Court of Appeals did not, and indeed could not, find an abuse of discretion in the District Court's determination that waiver on these facts is "wholly without merit."[4] Giving no deference to the factual findings of the District Court and the District Court's determination that there was no waiver, the Second Circuit substituted its own factual findings, and its discretion "under all the circumstances," for the findings and determination of the District Court.

The Second Circuit's decision is clearly wrong and is squarely in conflict with the decisions of the Court.

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4 Contrary to respondents' statement that Teledyne, Inc. did not advise the Court of Appeals of the appropriate standard of review (Respondents' Brief, at 19 n.3), Teledyne, Inc. argued the appropriate standard in its Petition for Rehearing and Suggestion for Rehearing In Banc, at 2, 3, 4, 9, 14. Respondents were the appellants before the Second Circuit and when the Second Circuit substituted its determination on waiver for that of the District Court, petitioner argued for the appropriate standard in its petition for rehearing.

II

Respondents argue there is no conflict among the circuits on the issue of waiver because the cases petitioner cites dealt with the waiver of a different defense, the defense of arbitration.

The legal issue before the Court for review, however, is the standard of review of a determination by a district court on whether a defendant, by its conduct, waived a timely interposed defense in its answer. On that issue, it is inconsequential what particular defense is the subject of waiver, whether the defense of invalid service or the defense of arbitration. The factual elements and legal standard for waiver of any pleaded defense are generally the same. The issue in this case is the standard of review of pretrial determinations on whether a pleaded defense has been waived. This is the conflict among the circuits which has manifested itself in decisions involving the defense of arbitration.

III

Respondents argue that the Second Circuit correctly found waiver because of counsel's silence at the scheduling conference. Respondents' argument is that the ethical duty of Teledyne, Inc.'s counsel to represent his client zealously and protect his client's interests and defenses is subordinate to counsel's duty to advise the court about defects in jurisdiction so that the court or respondents could timely correct them.

The respondents do not dispute what occurred at the conference before the magistrate three weeks after Teledyne, Inc. timely pleaded its defense of invalid service. Respondents' accusations that petitioner "mis[led] a judicial body," "lack[ed] candor," engaged in "subterfuge" do not change what occurred. At the conference, Teledyne, Inc.'s counsel was silent on the issue of invalid service while the magistrate

and the parties discussed a schedule for motions, including Rule 12 motions.

Respondents offer no refutation of petitioner's point that the Second Circuit's decision, in effect, requires petitioner's counsel to commit an ethical violation. The Second Circuit's decision holds that petitioner's counsel should have gratuitously advised his adversary at the conference of the defective service by mail, against his own client's interests and in breach of his ethical duty to represent his client zealously within the bounds of the law. Counsel adhered to the Rules precisely, and did not mislead the court in any way by action, representation or silence. Indeed, respondents concede that petitioner complied with Rule 12 by interposing its defense by answer rather than by pre-answer motion.[5] (Respondents' Brief, at 16).

Respondents' only argument in opposition is that, balanced against a lawyer's duty to represent his client zealously, is a duty to inform the court of defects in its jurisdiction, referring primarily to the general principle stated in Ethical Canon 7-20: "In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-20 (1970), *reprinted in* N.Y. Jud. Law app. (McKinney 1975). There is no legal support for such a position, either in judi-

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5 Respondents nevertheless imply that petitioner should have made a pre-answer motion, relying on an out-of-context quote that Rule 12 "contemplates the presentation of an omnibus pre-answer motion . . . ." 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1384, at 726 (2d ed. 1990). Immediately preceding this quote is the following: "Rule 12 is designed to protect parties from the unintended waiver of any legitimate defense or objection. Indeed, the only persons to whom Rule 12(g) presents a hazard are motion-minded lawyers who . . . make numerous motions." *Id.* at 725-726.

Neither Rule 12(g), nor Rule 16, also mischaracterized by respondents, in any way removes the option provided by Rule 12(b) and (h) of raising defenses either by responsive pleading or motion, which petitioner properly exercised in this case.

cial decisions or in ethics rules, commentaries, or opinions. Respondents cannot and do not cite a single statute, rule, or decision which petitioner's counsel violated in fulfilling his ethical duty to his client.

In respondents' view, the petitioner was obligated to advise the court about respondents' mistaken service so respondents could correct it. In petitioner's view, petitioner's counsel was ethically bound *not* to alert his adversary.

The decision of the Second Circuit is indefensible. The decision heralds a rule of law which subverts a fundamental ethical duty an attorney owes his client, and the adversary system itself.

IV

Respondents argue that since the Judicial Conference has proposed amendments to Rule 15(c) which would in effect "overrule" *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986), the issue which petitioner brings to the Court for review will be academic. Unlike a question resolved by an intervening change in statute, however, the "overruling" of *Schiavone* by the proposed amendments to the Rules is a decision which the Court itself must make under the Rules Enabling Act, 28 U.S.C. §§ 2072-2074 (1988).

It is the Court which, one way or the other, must review the decision in *Schiavone* as it applies to cases, such as the case at bar, and consider the wisdom of the proposed amendments or modifications the Court may wish to make to those amendments.[6] This case is a microcosm of the issues involved in Rule 15(c) relation back:

> 1. Can a party (Teledyne Industries, Inc.) be added to the litigation by "notice" under Rule 15(c), when the court had not obtained jurisdiction over the original defendant?

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6 The Judicial Conference is scheduled to meet on September 12, 1990 and formally report the proposed amendments to the Court.

2. Do state tolling provisions for effecting service constitute an extension of the applicable limitations period within the meaning of Rule 15(c) as defined in *Schiavone*?

3. If the statute is "tolled" against the named defendant (Teledyne, Inc.), but not as against the party to be brought in (Teledyne Industries, Inc.), does Rule 15(c) permit "tolling" as against the party to be brought in, for purposes of determining whether "notice" was timely?

With respect to the first issue, respondents argue that timely Rule 15(c) "notice" was given to Teledyne Industries, Inc., within the 60-day extension provided by N.Y. CIV. PRAC. L. & R. § 203(b)(5) (McKinney Supp. 1990) to the 2-year limitations period for wrongful death. The argument disregards the fact, as the District Court found, that no action remained to "relate back to" because the named defendant, Teledyne, Inc. had not been properly served, and was not subject to the general or specific jurisdiction of the court. (App. 26a, 33a).

The second issue was specifically raised by the dissenting justices in *Schiavone*. 477 U.S. at 37 n.4 (Stevens, J., dissenting). The Court in *Schiavone* adopted "the literal meaning of the significant phrase in Rule 15(c)" as referring, without any qualification, to "the limitations period," *id.* at 31, notwithstanding the dissenting justices' argument that "such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run." *Id.* at 37 n.4. The Second Circuit's decision which follows the views of the dissenting justices directly conflicts with the Court's interpretation of Rule 15(c) given in *Schiavone*.

The third issue, petitioner submits, depends on whether a so-called "identity-of-interest," a principle also raised in *Schiavone* but not decided, *id.* at 28-29, exists between the named defendant and the party to be brought in. In this case

as noted above, the District Court found as a factual matter that no such identity existed, whereas the Second Circuit implicitly found an "identity-of-interest" by treating Teledyne, Inc. and Teledyne Industries, Inc. interchangeably. As respondents concede, Rule 15(c) determinations are subject to a deferential/abuse-of-discretion standard of review, and this subsidiary factual finding, which the Second Circuit should not have ignored, further precluded relation back in this case.

CONCLUSION

For the reasons set forth above, and in the petition, petitioner urges that the petition for a writ of certiorari be granted.

Dated: September 11, 1990

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